

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1454

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

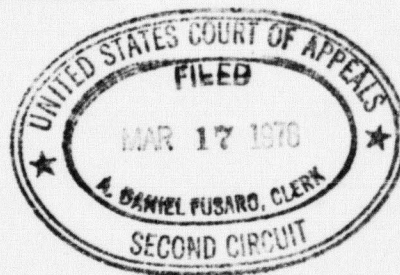
-against-

CHARLES WILLIAMS, ROBERT MC CRAY,

Appellants

REPLY BRIEF FOR APPELLANT

CHARLES WILLIAMS



ALBERT J. BRACKLEY, ESQ.
Attorney for Appellant
Charles Williams
Office & P. O. Address
186 Joralemon Street
Brooklyn, New York 11201
Tel: 625-5884/5737

TABLE OF CONTENTS

	<u>Page</u>
POINT I: UNITED STATES v. BENEDETTO AND UNITED STATES v. GUDELMAN, BOTH DECIDED IN THIS CIRCUIT FEBRUARY 24, 1978 COMPEL REVERSAL IN THIS CASE.	1

TABLE OF AUTHORITIES

	<u>Page</u>
Cool v. United States, 409 U.S. 100 (1972)	3
United States v. Benedetto, 2d Cir., February 24, 1978.	1,2
United States v. Gudelman, 2d Cir., February 24, 1978	1
United States v. Ramos, 2d Cir. February 14, 1978	4
United States v. Robin, 545 F.2d 775 (2d Cir. 1976)	4
United States v. Stein, 544 F.2d 96 (2d Cir. 1976)	4
United States v. Stulga, 531 F.2d 1377 (6th Cir. 1976).	3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 77-1454

CHARLES WILLIAMS, ROBERT McCRAY,

Appellants.
-----X

REPLY BRIEF FOR APPELLANT
CHARLES WILLIAMS

POINT I

UNITED STATES v. BENEDETTO AND
UNITED STATES v. GUDELMAN, BOTH
DECIDED IN THIS CIRCUIT FEBRUARY
24, 1978 COMPEL REVERSAL IN
THIS CASE.

We submit this Reply Brief to note three recent controlling Second Circuit decisions on points raised in our main Brief ("D. Br.") and to correct several blatant errors in the Government's Brief ("G. Br.").

(1) In United States v. Benedetto, 2d Circuit, February 24, 1978, and United States v. Gudelman, 2d Circuit, February 24, 1978, this Court significantly narrowed its prior approach to similar act testimony. It held that the permissible purpose issue with respect to which the similar acts are urged must be

clearly defined and must be a "real" issue, not a technical one; that the similar act should come in only on the Government's rebuttal, with of course its limitations clearly explained to the jury (see D. Br. 8-9); that the similar acts, while not required to be "unique signature" crimes to the charge in question, must nonetheless be unusual and distinctive with respect to such charge; and that there must be a meaningful analysis of the prejudice issue based on the fact that "once the jury is told of the defendant's other crimes, [it] will impermissibly infer that he is a bad man likely to have committed the crime for which he is being tried" (Benedetto Slip Op. pg. 1739).

These restrictions were not observed here (D. Br. 9-12). The similar act evidence overwhelmed the proceeding. (Six full pages of the Government's Brief, pp. 9 -15, are needed to describe it.) It was the single most significant part of the Government's direct case, rather than limited to rebuttal. It was no more unusual or distinctive than the payoffs in Benedetto (Slip Op. pp. 1740-41). Its clear prejudice was not analyzed. And plainly the district court never made the appropriate limitation on the jury's consideration -- first because it did think it had to (D. Br. 9), and second because the structure of the evidence within the similar act framework was never analyzed and defined, to wit, whether the Milwaukee Robbery was to show identity, to show purpose, to show common plan, or what have you.

(2) The Government repeats several times that our point on the accomplice charge is "frivolous" and "absurd" (G. Br. 29-30), a rather easy contention if one chooses to ignore, as the Government does, Cool v. United States, 409 U.S. 100 (1972) and United States v. Stulga, 531 F.2d 1377 (6th Cir. 1976) cited and discussed at D. Br. 13. In both the district court charged that the jury should not convict on the unsupported testimony of an accomplice unless it was convinced by it beyond a reasonable doubt (the charge here). The accomplices exculpated the defendants. In both the court reversed, finding a lack of clarity in the instruction and an erroneous negative implication that the exculpatory testimony had to be believed beyond a reasonable doubt to acquit, notwithstanding, as here, general instructions about the Government's reasonable doubt burden.

The Government has set out in full the language we challenge (G. Br. 30). Isn't the implication perfectly clear (an implication not specifically dispelled anywhere else in the charge) that if the jury cannot convict on unsupported accomplice testimony except if convinced beyond a reasonable doubt, it can convict on supported accomplice testimony without being so convinced? And even if we as lawyers know that is not what the language intends, such sophisticated knowledge hardly extends to the average juror. Cool v. United States, supra.

Because this error is so fundamental to the case, it is plain error and mandates reversal even without objection below.

(3) In United States v. Ramos, 2d Circuit, February 15, 1978 this Court re-iterated an intention expressed in United States v. Robin, 545 F.2d 775 (2d Cir. 1976) and United States v. Stein, 544 F.2d 96 (2d Cir. 1976) to review excessive sentences, especially when they may have resulted from a failure fully to consider defendant's corrections on the probation report, and are out of proportion to other sentences in the case (D. Br. 18-19).

We now have the sentencing minutes we lacked when we filed our main Brief. They are disturbing, particularly in view of the district court's determination to impose a forty-five sentence consecutive to fifty cumulative years Williams then had to serve, in effect a lifetime sentence (G. Br. 2*). Between trial and sentence Williams had a falling out with his trial counsel, Lombardino, and wanted another attorney (Tr. Sept. 15, 1977, pg.3). The district court denied that (p. 6). It then made a lengthy recitation of facts from the probation report, including attempted murder, prison escapes and criminal behavior while in a federal jail (pp. 9-10), and on that basis imposed the substantial sentence. The problem, however, was that Williams himself had never seen the probation report and apparently had not considered it with Lombardino (p. 15). The sentencing procedure, therefore, was defective in that Williams was denied his right to counsel of his choice, and was sentenced without an appropriate opportunity to review and correct the probation report. United States v. Robin, supra, United States v. Stein, supra. The excessive sentence which

resulted from it cannot stand. Re-sentencing should be before
a different judge. United States v. Ramos, supra.

Respectfully submitted,

ALBERT J. BRACKLEY, ESQ.
Attorney for Appellant
Charles Williams

United States v. Charles Williams, Docket No. 77-1454

Certificate of Service

I certify that on March 16, 1978 I had mailed ^{one copy of} the
Reply Brief for Appellant Charles Williams, to David G. Trager, Esq.,
225 Cadman Plaza, Brooklyn, New York 11201.

Donald E. Nawi
DONALD E. NAWI

